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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. [redacted] 85

THE BALTIMORE & OHIO RAILROAD COMPANY,

Petitioner,

—against—

BUZZY SKIDMORE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM A. BLANK,
Attorney for Respondent.

WILLIAM SAMUELS,
Of Counsel,
On the Brief.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

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No. 857.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Petitioner,

—against—

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The Circuit Court of Appeals, Second Circuit, in a unanimous decision by Frank, L. Hand and Swan, Circuit Judges, affirmed a judgment recovered by Buzzy Skidmore, the plaintiff, hereinafter referred to as the respondent, against The Baltimore & Ohio Railroad Company, the defendant, hereinafter referred to as the petitioner, in an action to recover damages for personal injuries sustained by the respondent, after a trial before Inch, *D. J.*, and a jury in the Eastern District of New York. The action was instituted under the Federal Employers' Liability Act (45 U. S. C. A., Sections 51-59) by the respondent against the petitioner to recover damages for injuries suffered by the respondent on January 19th, 1945 because the petitioner negligently supervised the opera-

tion of certain work and failed to furnish respondent with a safe place within which to do his work, and because the petitioner negligently failed to supply respondent with sufficient help for the work then being done, all of which resulted in the falling of a heavy spreader underneath a coal hopper car with the consequent result that the respondent suffered devastating injuries.

Respondent's Contention.

Petitioner's application is opposed because the decision herein, 167 F. 2d 54, and the judgment entered thereon by the Circuit Court of Appeals for the Second Circuit, is not in conflict with applicable decisions of this Court or the decisions of the various Circuit Courts of Appeals. Moreover, Points I and II contained in petitioner's brief in effect argue that the jury verdict in the instant case was against the weight of the evidence. Such an argument before this Court is definitely untenable as is indicated by this Court's decision in *United States* v. *Socony Vacuum Oil Co.*, 60 S. Ct. 811, 310 U. S. 150, 84 L. Ed. 1129, wherein Mr. Justice Douglas remarked at page 856:

> "Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review."

Rehearing was denied by this Court 60 S. Ct. 1091, 310 U. S. 658, 84 L. Ed. 1421.

The Facts.

The respondent, a 41 year old car man, employed by and in the petitioner's Lorain, Ohio, car shops for a four year period of time prior to the accident, resided with his wife and three children in Lorain, Ohio (fols. 88, 89, 176).

On January 19th, 1945, at 7:30 A. M., respondent reported for work at the foreman's office, at which time and place Mr. Beaver, another car man, and respondent, assigned by the petitioner as a two man crew received a written work order calling for installation of eight new doors on a specified coal hopper located or spotted on a track in the petitioner's yard (fols. 89, 91-94, 118-122, Exhibit 11, p. 264).

An examination of Exhibits 1-7 (pp. 244-255) reveals that the coal hopper in question was comprised of four hopper compartments and when fully equipped carried four sets of doors, two doors to each set riveted on to a door spreader or cross-bar as part of its undercarriage. When so equipped these coal hopper doors would, by means of latches and tumbler locks connected to said doors (fol. 108), swing open and shut as the occasion called for when unloading or loading coal. Each door weighed 96 pounds and each spreader weighed 190 pounds (fols. 142, 143). Invariably the petitioner would cause one or more of its cars, in for repair, to be located or spotted on any given track before car men reported for work so that a car man's written work order would also indicate the car and track where he was scheduled to work (fol. 96).

Respondent testified that when it was necessary to patch old doors or replace less than complete sets of doors it was the custom and practice in the peti-

tioner's Lorain yard for burner crews to burn off the impaired doors or parts thereof and leave the door spreaders attached to and suspended from the remaining good or unimpaired doors underneath the cars, whereupon two car men acting as a team would together replace the single doors and then key them or tentatively line them up with the suspended spreaders after which a rivet crew would permanently rivet them together. He further testified that when all eight doors of a car hopper had to be replaced with new ones, it was the custom and practice in petitioner's Lorain yard for a burner crew to completely burn down the doors and spreaders, salvaging the spreaders however, whereupon another crew would clean up the debris from under the coal hopper, and carry the salvaged spreaders to a door bench located in another part of the yard. There, respondent testified, the door bench crew would permanently rivet the new doors to the salvaged spreaders after which a crane or tractor crew would cart the attached doors and spreaders back to the spotted coal hopper and deposit them across the rails and under the hoppers. Then the car man crew consisting of three men, not two men, would with the aid of a large hydraulic jack, hang the complete units in their required places on the undercarriage pins of the coal hopper (fols. 97-139, Exhibits 7, 8, 9, 10, pp. 256-263).

All of the respondent's testimony relating to the prevailing custom and practice in the petitioner's Lorain yard at the time of the accident was corroborated by Mrs. Skidmore, employed by the petitioner as a car man's helper at that time and for two years prior thereto (fols. 405-414).

John Wilson, respondent's foreman also corroborated respondent's testimony on custom and practice

(fols. 627, 643-648). Wilson further testified that if all four doors on one side of the car were burned off, replaced with new doors, and then the four doors on the other side of the car were similarly burned off and replaced with new doors, then the spreaders would, all during this operation, remain suspended on the old and new doors respectively without ever dropping to the ground. He, however, did not believe that to be a good practice because as he expressed himself, "You will lose too much time that way" (fols. 646-649). Edgar Beaver, the other car man who was working with the respondent as a team at the time of the accident, also corroborated respondent's testimony on the prevailing custom and practice in petitioner's Lorain yard (fols. 672-677).

When Beaver and respondent started working on the spotted coal hopper car at 7:30 that morning they noticed that all eight of the old doors and the four connecting spreaders had been burned down. The debris was lying underneath the coal hopper and the salvaged four spreaders were separated and detached from the eight doors. Subsequently that day eight new doors, not attached to the spreaders, were brought to Beaver and respondent where the coal hopper was spotted (fols. 113, 138, 685-689).

On that day and for a continued period of *at least one month prior thereto* the entire yard was covered with snow and hard ice, notwithstanding the fact that the petitioner employed a couple of hundred men in that yard daily (fols. 122-125, 194, 195, 617, 654, 655). Neither before nor during the work progress of Beaver and respondent that day did any of petitioner's employees clear up the hard ice condition where Beaver and the respondent were working (fol. 124).

When the eight new doors were delivered to Beaver and the respondent they proceeded to hang them and the spreaders separately although respondent had never installed or seen any one install doors and spreaders in that manner (fols. 131-134). At about 3:15 P. M., while attempting to install the last spreader (fols. 143-146), respondent testified:

> "Q. In other words, just before the accident the last unit you and Beaver were trying to get on was this 190 pound spreader; is that correct? A. That is correct.
>
> Q. Now, will you tell us from that point on, where you were, how you worked and just what happened, Mr. Skidmore? A. Well, Mr. Beaver was on one side of the car and I was on the other, and we had to get down on our knees. I was down on my knees on the hard, slick, slippery ice, and had the bar stuck through the holes through the door for to bring our spreader up to have it ready to hook it on.
>
> Q. In other words, the idea was to get the spreader high enough you had to use a pull to get it up and then use the bar to stick through a hole in the door and get it through a hole of the spreader? A. That is correct.
>
> Q. And then put in a temporary bolt? A. Yes, sir.
>
> Q. All right, go on from there. You say you were down on your knees? A. I was down on my knees on the hard, slick, slippery ice. When I lifted this door spreader up here my knees went down like that (indicating) and that jerked me down forward, and I felt a terrific snap back in the area of my spine down low (indicating)."

POINT I.

Petitioner was negligent in directing respondent to perform such laborious work in an area continuously covered with snow and hard ice over a long period of time.

Both sides agree that on the day of the accident complained of and for a continued one month period of time prior thereto, the petitioner's entire yard, including the place where respondent was assigned to work that day, was completely covered with snow and hard ice notwithstanding the fact that all during this period of time the petitioner employed a couple of hundred men in that yard daily (fols. 122-125, 194, 195, 617, 654, 655).

Respondent further testified, and his testimony was in no wise contradicted, that neither before nor during the work progress of Beaver and himself that day did any of petitioner's employees clear up the hard ice condition where Beaver and the respondent were working that day (fol. 124).

That the petitioner directed the work to be done in the dangerous area complained of is evidenced by its written work order calling for installation of eight new doors on a specified coal hopper located or spotted on a track in the petitioner's yard which was completely covered with snow and hard ice (fols. 92, 118, 120). The respondent further testified:

> "Q. Then would it be the custom at the yard, and was it carried out during the years that you were a car man, to spot or locate a car at a particular place in the yard where you were to go to work? A. Well, they would spot them there in

the yard just any place where they were doing the work, you know.

Q. That is what I mean. They would spot them for you before you would come to work? A. That is right.

Q. Then when you got your written order it would call for doing work on a certain car located on a certain track? A. That is right" (fol. 96).

It is therefore abundantly clear that respondent had absolutely nothing to do with the spotting or locating of the coal hopper in question on the track in the area where the work was specifically called for.

Regarding the petitioner's contention contained in the first point of petitioner's brief, one is moved to ponder what interpretation the petitioner places on the 1939 amendments to the Federal Employers' Liability Act. Concededly, the petitioner owed respondent the duty to furnish him with a safe place to work. It must also be conceded that by the 1939 amendments respondent did not assume the risks of his employment.

Does it not suffice, at least to the extent of creating a jury question, that the petitioner, notwithstanding the fact that it employed more than two hundred men daily in the Lorain Yard at the time of the accident, directed by written order that the work in question be done in an area completely covered by snow and hard ice?

Would the petitioner have this learned Court believe that the jury should not be allowed to deliberate on this most vital issue? Does the petitioner sincerely believe that under these circumstances and the conditions existing at the time of the injury, it actually provided respondent with a safe place to work?

If the petitioner had a mind to be guided by the Congressional amendments of 1939, or if at least in some slight degree it considered the safety of its employees it would in this case have caused that area of hard ice to be dissolved or chopped up and removed, *before* assigning respondent to perform such dangerous and laborious work at the place where the coal hopper in question had been spotted or located.

That an icy condition existing two days prior to an accident presented a jury question as to negligence was fairly recently decided. Under such circumstances what interpretation can this Court place on a similar icy condition existing for more than one month continouously prior to the accident?

In *Rashaw* v. *Central Vermont Ry., Inc.,* 133 F. 2d 253 (decided February 3, 1943, C. C. A., 2nd Cir.), Chase, Circuit Judge, ably held at pages 254 and 255:

> "* * * we shall treat his fall for the purposes of this appeal as one from the bridge.
>
> There was no substantial dispute as to the condition of the bridge. The ties on which the rails rested were very slippery because of ice which was thick enough to make them rounded on the top. * * * There was undisputed evidence that the bridge had been in about the same icy condition *two days* before the accident when the conductor walked over it with the assistant superintendent of the northern division of the railroad.
>
> * * * *
>
> The case as thus made presented a jury question as to the negligence of at least the defendant railroad *in allowing the bridge to remain in its icy condition when the plaintiff's intestate was required to cross it to do his work.*" (Italics the writer's.)

Another case dealing with similar facts recently decided, is *Ramsouer* v. *Midland Valley R. Co.*, 135 F. 2d 101 (C. C. A., Eighth Cir., decided April 7, 1943), where Gardner, Circuit Judge, cogently commented on pages 105 and 106:

> "* * * There had been freezing weather, alternating with milder temperatures, *for about a week,* with some precipitation in the nature of sleet and snow. *The sleet and snow had not recently fallen.* * * *
>
> Viewing the evidence in the light most favorable to plaintiff, we think it presented a genuine issue of fact from which a jury might reasonably decide that Ramsouer's injuries resulted in whole or in part from the negligence of the defendant (1) in that it failed to maintain this switch track in a reasonably safe condition, or place it in such condition *by removing the ice and snow at least from the curve therein prior to attempting the switching operation;* * * *." (Italics the writer's.)

See also *Raudenbush* v. *Baltimore & O. R. Co.*, 160 F. 2d 363 (C. C. A., Third Cir.), decided February 19, 1947, where the Court aptly remarked on page 367:

> "The place of work here was a switch yard. It is a place of moving cars and locomotives and no reason exists why, *within the confines of such yard, the employer should not be required to exercise a reasonable degree of care to prevent an accumulation of snow or ice in such quantity and location as would constitute a menace to the safety of the employees in the performance of their various duties.* * * *" (Italics the writer's.)

Under the rulings of the various Circuit Courts of Appeals, it would conclusively appear that no conceivable reason existed which would entitle the petitioner in this action to assume it had the right to direct its employees to perform laborious work in areas completely and continuously covered by snow and hard ice for more than one month prior to the accident as was proven in this case.

See also *Lilly* v. *Grand Trunk Western R. Co.*, 63 S. Ct. 347, 317 U. S. 481, 87 L. Ed. 411, where Mr. Justice Murphy delivering the opinion of the Court clearly enunciated on page 351:

> "The use of a tender, upon whose top an employee must go in the course of his duties, *which is covered with ice* seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated." (Italics the writer's.)

Foreseeability, it is believed, is the crux of this case. Could the petitioner have foreseen that under all of the prevailing conditions on January 19th, 1945 such an accident could have occurred?

The most recent cases decided by the Supreme Court of the United States and the various Circuit Courts of Appeals indicate that the Trial Court in this action did not err in submitting to the jury for its ultimate determination the factual issues here involved.

In *Lillie* v. *Thompson*, 68 S. Ct. 140, decided on November 24th, 1947, the petitioner a 22 year old female telegraph operator was employed by the respondent's railroad to work alone between the hours of 11:30 P. M. and 7:30 A. M. in a one room frame building situated in an isolated part of the railroad's

yard. The petitioner's duties were to receive and deliver messages to men operating trains in the yard. About 1:30 A. M. on the night of her injury, petitioner responded to a knock thinking that some of the respondent's trainmen were seeking admission. She opened the door and before she could close it a man not in the respondent's employ entered and beat her with a large piece of iron, seriously and permanently injuring her.

The petitioner sued for damages under the Federal Employers' Liability Act and her contention was that she was injured as a result of the respondent's negligence in sending her to work in a place he knew to be unsafe without taking reasonable measures to protect her.

The District Court dismissed the complaint for failure to state a cause of action and entered summary judgment for the respondent. The Circuit Court of Appeals affirmed without opinion (6 Cir., 162 F. 2d 716). The Supreme Court in a *per curiam* opinion appropriately held, on page 142:

> "We are of the opinion that the allegations in the complaint, if supported by evidence, will warrant submission to a jury. * * * That the foreseeable danger was from intention or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

See also *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Lavender* v. *Kurn*, 327 U. S. 645; *Blair* v. *B. &*

O. R. Co., 323 U. S. 600; *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; and the second *Tiller* case, 323 U. S. 574; *Jesionowski* v. *Boston & Maine Railroad*, 67 S. Ct. 401; *Boston & M. R. R.* v. *Meech*, 156 F. 2d 109 (C. C. A. 1), cert. denied 329 U. S. 763; *Boston & M. R. R.* v. *Kyle*, 156 F. 2d 112 (C. C. A. 1); *Fleming, et al.* v. *Husted*, 164 F. 2d 65 (C. C. A. 8).

In that connection this Court is respectfully referred to the case of *Keith* v. *Wheeling & L. E. Ry. Co.*, 160 F. 2d 654, wherein Hicks, Circuit Judge, after elaborating on the opinions contained in the most recent cases passed upon by the United States Supreme Court, dealing with this question, says the following on page 658:

> "We do not review the facts of these cases but it is plain from their examination that the authority of courts *by direction of a verdict*, to withdraw from the consideration of a jury matter bearing upon the question of the defendant's negligence and its proximate relation to the injury *is now very restricted indeed.*" (Italics the writer's.)

Under all of the circumstances in this case therefore the jury certainly had a right to pass on so integral a question when determining that petitioner's negligence brought about this accident in whole or in part.

The cases cited in petitioner's brief relating to this subject, more particularly contained in its first point, are clearly distinguishable from the facts involved in the instant case and the writer therefore presumes to make some comment on said cited cases.

In *Missouri Pac. R. Co.* v. *Aeby,* 48 S. Ct. 177, 275 U. S. 426, 72 L. Ed. 351, appearing on pages 9 and 10 of the petitioner's brief, the Court in reciting the facts there involved said, among other things, on page 179:

> "* * * When it rained, there accumulated in this and other depressions on the platform puddles of water, which gradually disappeared. By the time of the accident, the depression in front of the steps had become somewhat larger and deeper, by reason of rains and constant use. Its surface was rough. *No ice had formed there after respondent came. The platform was dry the evening before the accident.*" (Italics the writer's.)

It is therefore apparent that the facts themselves are clearly distinguishable in that the ice formation in that case existed for only a matter of a few hours prior to the accident, whereas in the instant case it continued over a period of more than one month, with which fact the parties to this action are in complete accord.

Moreover, immediately following the quoted portion appearing on pages 9 and 10 of petitioner's brief, relating to the *Missouri* case, Mr. Justice Butler, writing for the Court, aptly remarked on page 179:

> "* * * The obligation in respect of station platforms and the like owed by carriers to their passengers or to others coming upon their premises for the transaction of business *is greater* than that due their employees accustomed to work thereon. *The reason is that the latter, familiar with the situation, are deemed voluntarily to take*

the risk of known conditions and dangers." (Italics the writer's.)

The *Missouri* case was decided on January 3rd, 1928, some eleven years prior to the abolishment of the assumption of risk defense. (See Title 45 U. S. C. A., Section 54.) No longer are federal employees, under the Federal Employers' Liability Act, deemed voluntarily to assume the risk of known conditions and dangers. That the Courts so interpret in this day and age the holding in the *Missouri* case is clearly apparent from an examination of the opinion in *Handy* v. *Reading Co.*, 66 F. Supp. 246, where the Court held, on page 249:

> "To sustain its motion for judgment *non obstante veredicto,* defendant relies upon the cases of *Missouri Pac. R.* v. *Aeby,* 1928, 275 U. S. 426, 48 S. Ct. 177, 72 L. Ed. 351, * * *.
>
> Furthermore, it will be seen that the cases relied upon by the defendant were decided before the Amendment of 1939, withdrawing assumption of risk as a defense in Federal Employers' Liability cases. The decision of the Supreme Court in the *Tiller* case, *supra,* indicates that the decision in the *Aeby* case was responsible in part for the Amendment of 1939."

In *Tiller* v. *Atlantic Coast Line R. Co.*, 63 S. Ct. 444, 318 U. S. 54, 87 L. Ed. 610, Mr. Justice Black ably remarked on pages 446 and 447:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing

its name to 'non-negligence'. As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U. S. C. A., Section 1 *et seq.*, 'Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name;' and no such result can be permitted here."

The case of *McGivern* v. *Northern Pacific Railway Co.*, 132 F. 2d 213 (8th Cir.) cited on page 10 of petitioner's brief, is clearly distinguishable and becomes most evident upon examination of certain of the quoted facts and holdings therein enunciated by Gardner, Circuit Judge, on page 217, wherein he states:

"* * * The steps on this switch engine were, when the crew began to use them, *free of snow.* The accumulation of snow and ice *during the progress of the work* was a natural and normal consequence due to the *recently fallen snow in the yards.* There were no inherent imperfections in these steps rendering them less fit for the use for which they were intended. * * * The condition of these foot boards was continually changing because of the snow being carried on to them by the workmen and packed down. * * *

* * * Under the prevailing conditions which were perfectly obvious snow on the foot boards could not have been avoided. It was a natural and necessary result of existing climatic conditions." (Italics the writer's.)

How in all sincerity can facts such as are contained in the *McGivern* case be compared with the facts in the instant case where the snow and hard ice condition existed for more than a month?

The case of *American Bridge Co.* v. *Bainum,* 146 Fed. 367 (3rd Cir.) also appearing on page 10 of petitioner's brief, is not a Federal Employers' Liability case, and is in no wise in point with the facts herein involved.

The *Wichita Falls & S. R. Co.* v. *Wade,* Court of Civil Appeals of Texas, 57 S. W. 2d, 332, also appearing on page 10 of petitioner's brief, was decided on December 24, 1932 prior to the abolishment of the assumption of risk defense and the decision therein was clearly based on a defense of assumption of risk for there the Court held, on page 337:

> "* * * we believe that the defense of assumed risk was conclusively established, independently of the issue of defendant's negligence."

The cases of *Atchison, T. & S. F. Ry. Co.* v. *Ford,* 171 Okla. 516, 43 Pac. 2d, 459 and *Clark* v. *Howard,* 88 Fed. 199 (8th Cir.) both cited on page 11 of petitioner's brief, were similarly cases decided prior to 1939 when the defense of assumption of risk still prevailed for the benefit of railroads.

POINT II.

The manner in which the work was being done on the day of the accident was not of respondent's own choice.

As to the condition in which Beaver and the respondent found the spotted coal hopper the morning of the accident, Beaver, petitioner's witness, testified (fol. 669):

"Q. And the job as you did it that day, as you

now say, that car had all the doors burned off? A. Yes, but we were putting in single doors and spreaders separate."

In the same vein, Wilson, petitioner's witness, also testified (fol. 643):

"Q. There is no question in your mind but that all the doors, the old doors, the eight doors, were burned off? A. That is right, they were burned off."

Respondent on that score testified (fol. 113):

"Q. Now, when you came to work on the morning of the accident how did you find the car that you received working orders on? What condition was it in? A. It had all been burned down clean; all the doors, spreaders, everything, dropped underneath the car.

Q. And was the spreader, were the spreaders that you say were under the cars, were they there without doors attached? A. Yes, sir."

These facts coupled with the assignment called for in the work order of the day, Exhibit 11 (p. 264), lead to the inescapable conclusion that the petitioner directed the work on said coal hopper be done by Beaver and respondent in the manner specifically employed. If the petitioner desired that the work be done in any other manner, it would have had another crew clean up the debris; cart the old spreaders to the work or door bench where still another crew would rivet the four salvaged spreaders on to eight new doors; whereupon a third crew would by means of a crane or tractor haul back the attached doors and spreaders to the spotted coal hopper and deposit them across the rails and under the hopper. Then the car-man crew consisting of three and sometimes

four men, with the aid of a large hydraulic jack would hang the complete units under the coal hopper.

At one point in his testimony, Beaver, petitioner's witness, testified that the method employed on that day by him and respondent was a customary one when he said (fols. 652-654):

> "Q. Now, you heard Mr. Skidmore describe the manner in which you were putting up the spreaders on that day in question? A. I did.
>
> Q. Would you say that that was the ordinary custom and practice and that you had followed it yourself for a long time? A. I had put them up that way myself, yes.
>
> Q. Do you recall ever working with Mr. Skidmore on that particular job before? A. No. I can't say that I did.
>
> * * * *
>
> Q. Have you observed other men in the yard working in two's putting up spreaders the same way? A. Yes, I have seen lots of them do it that way.
>
> Q. You have seen lots of them do it that way? A. Yes."

Wilson, another witness for petitioner, corroborated this testimony when he said (fol. 621):

> "Q. —will you say that the work was done that day in the usual and customary manner? A. That is right."

It conclusively appears therefore that the method employed that day by Beaver and the respondent was one of the customary methods practiced in petitioner's yard although respondent had never personally installed or seen any one install doors and spreaders

in that manner in the petitioner's yard (fols. 132, 133). The only plausible deduction therefore is that Wilson, the petitioner's foreman, with full knowledge of the fact that the undercarriage of the coal hopper had been completely burned down, ordered, and directed that the work be done in the manner it actually was being done by Beaver and respondent at the time of the accident.

True it is, that this practice called for only two men to hang the doors and spreaders. Petitioner approved that unsafe method of doing the work because it saved time, a factor most essential to the petitioner for as its witness, foreman Wilson, testified (fol. 648):

> "A. Well, that wouldn't be good practice, because that work has to be done before the men get over there. You will lose too much time that way.
>
> Q. You will lose time? A. That is right."

That a safer method of doing the work, calling either for a three or four car-man crew rather than a two man crew was sometimes followed by the petitioner is not only deducible from respondent's testimony heretofore referred to, but from that of petitioner's witness, Beaver, who testified (fols. 669, 670, 675, 676):

> "Q. All right. Now, wasn't it the practice, sir, the company practice there, that when you had to put in—when the car was burned off all around so that the doors were burned off and the spreader was burned down, that you would use three and four men for the job of installation? A. Well, if it was a full unit both doors and spreaders, they used three sometimes, and I have saw four.

Q. And the job as you did it that day, as you now say, that car had all the doors burned off? A. Yes, but we were putting in single doors and spreaders separate.

* * * *

Q. But the car was burned off all around? A. Yes.

* * * *

Q. And where you put in all new doors in a car that has been burned all the way down, now you have to put in a unit, don't you, of doors and spreaders, because the doors have been burned away and the spreaders have been burned away? A. If they are all burned down.

Q. Now, they have a work bench where spreaders are riveted on to doors haven't they? A. Yes.

Q. And when they do that the whole unit is brought over by a tractor or a crane? A. Yes.

Q. And swung under as far as you can get it under the car? A. That is right.

Q. Then the whole unit is jacked up by a jack which does the lifting instead of your back muscles; isn't that so? A. That is right.

Q. And the man comes along and just works the jack, and that lifts the weight up into place? A. Yes.

Q. And the pins are put in? A. Right.

Q. That is the practice that obtained out there? A. Yes.

Q. And you saw it done that way? A. Yes, sir."

It is therefore clearly apparent that the petitioner employed two separate methods of doing that type of work in its yard, but elected to use the unsafe method to save time, wages and manpower.

Our courts have uniformly held that although railroads adopt and follow certain customs and practices of doing different types of work in their yards, when it is once proven that such customs and practices are dangerous in nature, sufficient negligence is established to warrant jury verdicts against them for injuries sustained as a result thereof.

In *Fletcher* v. *Baltimore & Potomac Railway,* 168 U. S. 135, 18 S. Ct. 35, there existed a custom and practice on the defendant's railroad that employees of the railroad were allowed the privilege of bringing back with them for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the defendant's roads, such as solid pieces of bridge timber, cross-ties, etc. It was the constant habit of the men, over a number of years, to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other persons waiting there for it. The only caution given the men on the part of the servants or agents of the railroad was that they should be careful not to hurt anyone in throwing the wood off. The foreman of the gang was the man who usually gave such instructions.

In that case, as the train passed the plaintiff, an employee of the defendant, another workman on board threw from the car on which he was standing, a stick of bridge timber about six inches square and about six feet long. It struck the ground and rebounded, striking the plaintiff, and permanently injuring him.

Mr. Justice Peckham, who delivered the opinion of the Court, cogently commented, at page 142:

> "* * * If, however, it had been proven in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care, and not hurt anybody, and *if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.*" (Italics the writer's.)

In *Palum* v. *Lehigh Valley R. Co.,* a most recent case decided by the Circuit Court of Appeals, Second Circuit, 165 F. 2d 3, decided January 7th, 1948, dealing with customs and practices of railroads, Augustus N. Hand, Circuit Judge, aptly remarked on page 5:

> "It would certainly have been *safer* to send a fireman over the route who was familiar with it and there was evidence indicating that this *safer method,* if not invariably practiced, was generally employed. In such circumstances we think it was required by the recent decisions of the Supreme Court to leave to the jury the question of whether that *safer method* should not have been chosen." (Italics the writer's.)

In *Boston & M. R. R.* v. *Meech,* 156 F. 2d 109, Woodbury, Circuit Judge, appropriately held, on page 111:

> "It may be that the locomotive was being operated in the way *usual and customary* for the maneuver which resulted in the death of the de-

> cedent, but nevertheless the fact remains that it could have been operated *more carefully. Another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender for workmen in the vicinity of the engine house, who might be presumed to be busy and hence inattentive at times to their own safety,* * * *." (Italics the writer's.)

A writ of certiorari to the United States Supreme Court in that action was denied on October 28, 1946, as reported in 67 S. Ct. 124.

Interesting is this language because of the fact that in that case the Court properly reasoned that another man could have been assigned on the job in question. The same situation exists here for had the defendant ordered this job done with a three or four man crew on secure ground, this accident would never have occurred.

Further, on the question of using safer methods as distinguished from practices usual and customary amongst railroads, this Court's attention is called to the case of *Boston & M. R. R.* v. *Kyle,* 156 F. 2d 112, where in a *per curiam* opinion, the Court held:

> "In affirming the judgment below it will suffice to say that there is ample testimony in the record to indicate, first, that although the plaintiff *was experienced in the kind of work he was doing when he was hurt,* he was at that time working under the direction and subject to the orders of his fellow machinist, and, second, that although the latter directed that their work be done in the usual or customary way, *there was a safer way in which it could have been done* * * * and that, *if this safer method of procedure had been fol-*

lowed, the injury which befell the plaintiff would not have occurred." (Italics the writer's.)

It is therefore apparent that the establishment of a custom and practice on any given railroad as to the manner of doing a certain type of work, does not in and of itself exempt the railroad from liability. Juries at all times are permitted sufficient leeway to deliberate as to whether or not the established customs and practices are dangerous ones, or, in the alternative, whether safer methods could not have been employed under the circumstances. Respondent contends therefore that the jury in the instant case was properly allowed to pass on this question and, as is evidenced by its verdict, actually did find that the petitioner's practice of using a two car-man crew on this assignment was a dangerous one and that it was safer to use its other practice of assigning a three car-man crew and using its other paraphernalia, such as work and door benches including their crews, crane and/or tractor equipment and maneuvers including its crew, etc.

For the reasons incorporated and outlined herein it becomes unnecessary to comment upon the cases cited in the second point of petitioner's brief since those cases do not apply and are distinguishable from the facts in the instant case. In addition the cases of *Cartwright* v. *Atchison T. & S. F. Ry. Co.,* 228 Fed. 872 and *Unadilla Valley R. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224, were decided prior to the abolishment of the assumption of risk defense.

POINT III.

The refusal of the Trial Judge to direct the jury to bring in a written verdict did not constitute reversible error.

Immediately prior to summation of both counsel, petitioner's attorney submitted to the Court Exhibit C for Identification as the proposed form of a written verdict by the jury. In denying said request the Court remarked:

> "The Court: I return your request. It is really nothing more than will be covered by my charge to the jury. As to having a written verdict, I see no necessity for it at the present time."

to which procedure petitioner's counsel excepted (Exhibit C, p. 295, fols. 697-699).

On page 14 of his brief, petitioner's counsel claims that as a result of the Trial Court's ruling on this request,

> "The defendant has been prejudiced by the Court's refusal."

This contention is clearly fallacious.

It is conceded that if the Court thereafter failed to include in its charge, the general contents of said exhibit and petitioner's counsel timely took exception thereto, thereby affording the Trial Court an opportunity to cure such omission, then reversible error would have been committed upon the Court's refusal to amplify its charge or direct the written verdict requested.

An examination of the record, however, reveals beyond any question of doubt that all the matter contained in Exhibit C was fully covered in the Court's charge, all of which petitioner's counsel fully appreciated, for when the Court upon completion of its charge specifically inquired whether petitioner's counsel took any exceptions or desired any requests, Mr. Combs remarked:

> "Mr. Combs: I have none, your honor" (fols. 723, 700-724).

Petitioner's counsel in a criticizing vein further argues, on page 14 of his brief, that:

> "The Circuit Court held that under Rule 49—Federal Rules of Civil Procedure—the Trial Judge has full, uncontrolled discretion in the matter and that, therefore, the Circuit Court cannot hold that the Trial Judge erred when, as here, for any reason or for no reason whatever, he refused to demand a special verdict."

Hughes on Federal Practice, interpreting said rule, states:

> "Sec. 24303. Special Verdict Discretionary. Under the rule the court is not required to submit a special verdict in any case. The rule merely authorizes the court to submit a cause on special verdict, the language of the rule being 'may' thus leaving it within the discretion of the court whether or not a cause should be so submitted."

Concededly therefore the Trial Judge may make one of two rulings in this type of case, namely, to decide whether to accept at the jury's hands a general or a special written verdict. For defeated counsel to

whimper immediately that this discretionary power has been abused merely because the Trial Court directed that a general verdict be returned and to permit such counsel to accuse an Appellate Court of having erred in not reversing for this reason, is similarly fallacious.

True, much has been written by some Appellate Courts on the desirability and preference of special jury verdicts over general jury verdicts to the end that Appellate Courts could more easily detect error creeping into jury deliberations.

With full realization that the following argument is being submitted to the highest Appellate Court of this great and revered land, the writer is moved to inquire if our worthy and learned Federal Trial Judges, bearing their most difficult tasks during the tenure of a civil jury trial, as in the instant case, are in no wise to be considered? Are they not sufficiently competent and adequately equipped to be entrusted with the discretionary power actually afforded them under said rule to properly determine in any given case whether their juries shall hand down in one instance a general verdict and in another a special verdict? Are our much respected Federal Trial Judges not in the best position, having questioned and carefully observed the individual jurors during the course of a civil jury trial, to intelligently determine the type of verdict the particular jury shall deliberate on as being fair to all litigants concerned?

The writer sincerely reasons that the rule in question was so promulgated by this very learned and respected Court with some such thoughts in mind and therefore fails completely to follow the untenable argument of the petitioner's counsel in his contention

that the trial judge abused his discretionary powers in this instance.

That the Circuit Court of Appeals below, by its unanimous affirmance, similarly rejects petitioner's contention, is most evident from an examination of the following excerpts included in the opinions of Circuit Judges Frank and L. Hand. Judge Frank states, 167 F. 2d 54, at pages 55 and 56:

> "* * * Since the judge properly charged with respect to a deduction for contributory negligence, pursuant to the Act, we must assume that the jury made such a deduction. * * *.
>
> Defendant argues that the judge erred in denying its request for a special verdict. We cannot agree."

Again on pages 66 and 67:

> "* * * the federal district judge, under the Rule, has full, uncontrolled discretion in the matter: * * *.
>
> Accordingly, we cannot hold that a district judge errs when, as here, for any reason or no reason whatever, he refuses to demand a special verdict, * * *."

L. Hand, Circuit Judge, remarks on page 70:

> "I concur in holding that there was evidence to support the verdict, and that it was not an error to refuse to take a special verdict along with a general verdict."

In *W. B. Grimes Dry-Goods Co.* v. *Malcolm, et al.*, 17 S. Ct. 158, 164 U. S. 483, Mr. Justice Harlan aptly remarked on page 160:

> "The submission of special questions to the jury

is, under the statute, in the discretion of the court. It was so held in *Railway Co.* v. *Pankhurst,* 36 Ark. 371, 378. Independently of the statute of Arkansas, this court has held that 'the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading, nor a form or mode of proceeding', within the meaning of the practice act of June 1, 1872 (17 Stat. 197), now section 914 of the Revised Statutes, and that 'the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which in that respect he is clothed.' *Association* v. *Barry,* 131 U. S. 100, 119, 9 Sup. Ct. 755, 761."

See also, *Erie R. Co.* v. *Downs,* 250 Fed. 415, decided by the Circuit Court of Appeals, Second Circuit, *prior* to the abolishment of the assumption of risk defense in the Federal Employers' Liability actions, where Rogers, Circuit Judge, cogently commented at page 420:

"There was no special question submitted as to whether the accident happened as a result of one of the risks which defendant claimed that the plaintiff assumed. If the plaintiff had assumed the risk, that fact constituted an absolute defense. The defendant claims that by not including the question as to whether plaintiff had assumed the risk in the number of questions upon which the court required a special finding it in effect withdrew from the consideration of the jury that question. Counsel for defendant expressly requested the submission of a special question on assumed risks. The court said: 'I decline to send that as a special question to the jury'. Counsel took an exception. The court then said: 'That they will take care of in their general verdict'. *We are*

not prepared to say that this constituted reversible error, as the jury had been fully instructed on that subject, and must have understood perfectly that, if plaintiff assumed the risk, he could not recover." (Italics the writer's.)

In *McAuliffe* v. *New York Central & H. R. R. R. Co.*, 172 App. Div. 597, 158 N. Y. S. 922 (2d Dept.), the Court remarked at pages 926 and 927:

> "Defendant's counsel asked the trial court to direct the jury to find specially 'what proportion of the plaintiff's negligence contributed to the accident, in case they should find that the plaintiff's negligence was not the sole cause of the injury'. This the court denied, to which defendant excepted. The federal statute, by which contributory negligence lessens the damages, is borrowed from the early negligence rule in Illinois, and the existing Georgia practice now embodied in Georgia statutes (Thornton, Fed. Emp. Liability (3d Ed.) Sec. 78); also from the admiralty rule of apportionment (60 Cong. Record, p. 4536, quoted by Thornton, p. 169).
>
> * * * *
>
> At the date of this trial (February 15-24, 1915) juries did not generally return special verdicts under this statute. * * *
>
> * * * Yet, according to the trial practice as understood and followed a year ago, both in the federal and state tribunals, we cannot say that the court committed reversible error in refusing counsel's request."

In support of petitioner's contention that the Circuit Court erred in declaring that the trial judge had full, uncontrolled discretion in this matter and that therefore it could not hold the trial judge erred when he refused to demand a special verdict, counsel

for petitioner cites, on pages 14 and 15 of his brief, six separate Federal Court decisions none of which, it is respectfully argued, apply to the proposition of law here involved.

The case of *Charles D. Newton* v. *Consolidated Gas Company of New York,* 259 U. S. 101, 66 L. Ed. 845, involved Equity Rule 68 (33 Sup. Ct. XXXVIII) which provided as quoted by this Court on pages 104, 105:

> "The District Court may * * * appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct."

In that case the District Court allowed a duly appointed Special Master for 282 days work, fees amounting to $118,000. This Court in reducing said amount to $49,250 cogently commented, page 105:

> "Discretion within intendment of the rule is a judicial one. It does not extend to arbitrary and unreasonable action; and our review is limited to the question of its improvident exercise."

The cases of *Central Trust Co. of New York* v. *United States Light and Heating Co., et al.,* 233 Fed. 420 and *City of New Orleans* v. *Malone,* 12 F. 2d 17, dealt with the same proposition, namely, the fixing of fees by a Federal District Judge.

The case of *A. Howard Myers, et al.* v. *Bethlehem Ship Building Corporation,* 303 U. S. 41, 82 L. Ed.

638, stands for the principle that since the District Court had no jurisdiction of a shipbuilding company's suit to enjoin the National Labor Relations Board from holding hearings on a complaint filed by the Board against the company, the Circuit Court of Appeals should have reversed the District Court's decree granting a preliminary injunction.

Central Trust Co. v. *Chicago, Rock Island, etc., Co.*, 218 Fed. 336, 134 C. C. A. 144, involved the denial by a Federal District Judge of a petition for leave to intervene in a foreclosure suit where the Appellate Court held, on page 339:

> "The general rule is that the denial of a petition to intervene is discretionary and therefore not appealable. The discretion, however, must be exercised in accordance with recognized judicial standards."

United States v. *Haupt, et al.*, 136 F. 2d 661, was a criminal lawsuit involving many questions, one of which dealt with the Trial Court's refusal to sever on motion of some of the defendants whereupon the Appellate Court held, on page 672:

> "The crux of the attack upon the alleged unfairness of the trial revolves in the main around the court's denial of defendants' motion for severance. It is earnestly insisted that it was impossible under the circumstances for the individual defendants in a joint trial to obtain a fair and impartial hearing. * * * The main argument as to the alleged unfairness of a joint trial has to do with the prejudicial effect of certain evidence offered by the government."